

² Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review new evidence for the first time on appeal. 20 C.F.R. § 501.2(c). Appellant may submit the new evidence along with a written request for reconsideration to OWCP.

FACTUAL HISTORY

On February 4, 2010 appellant, then a 50-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that she had sustained a right knee, thigh, groin and hip injury in the performance of duty on February 2, 2010. She noted that her injury occurred while she was at the Department of Agriculture's firearms range for qualification in using a shotgun. Appellant bent down in the kneeling position and her right knee slid forward.

In a merit decision dated March 23, 2010, OWCP accepted appellant's claim. On July 22, 2010 it terminated her medical and wage-loss benefits.

OWCP affirmed its termination in a merit reconsideration decision dated September 2, 2011. It found that appellant had not submitted sufficient medical evidence to support that her preexisting hip arthritis had been aggravated by the traumatic event of February 2, 2010.

By appeal request form dated August 27, 2012, recorded as received by OWCP on September 4, 2012, appellant requested reconsideration of the September 2, 2011 decision.

With her request for reconsideration, appellant submitted a report dated August 24, 2012 from Dr. R. Marshall Ackerman, a Board-certified orthopedic surgeon, who stated that on February 2, 2010 appellant slipped and fell, landing on her right side. She was diagnosed with hip sprain superimposed upon her osteoarthritis and later underwent a total hip replacement. Dr. Ackerman compared x-rays taken in 2006 with x-rays taken in 2010 and found no significant increase in degenerative changes. He stated that it was his opinion to a reasonable degree of medical certainty that the injury of February 2, 2010 aggravated appellant's preexisting osteoarthritis of the hip and that this led to the need for a total hip replacement.

By decision dated March 11, 2013, OWCP denied appellant's request for reconsideration without a merit review, finding that the request was untimely and that she had not established clear evidence of error. It stated in the decision that her request was untimely because it was received more than one year after the September 2, 2011 decision was issued; and that therefore she was not entitled to a merit review. OWCP found that appellant did not submit clear evidence of error, and engaged in a limited review of the record, stating that Dr. Ackerman's report was not clear in that he did not find a significant increase of symptoms between x-rays taken in 2006 and x-rays taken in 2010.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ When review is sought for merit decisions issued on or after

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

August 29, 2011, timeliness is determined by the document receipt date of the reconsideration. If the request for reconsideration is received more than one year after the last decision, the request must be considered untimely.⁵

OWCP may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, it must nevertheless undertake a limited review to determine whether the application establishes clear evidence of error.⁶ OWCP regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows clear evidence of error on the part of OWCP.⁷

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹²

In order to establish clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that it abused its discretion in denying merit review in the face of such evidence.¹⁴

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁶ See 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1602.5a (October 2011). OWCP's procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that OWCP made a mistake. For example, a claimant provides proof that a schedule award was miscalculated, such as a marriage certificate showing that the claimant had a dependent but the award was not paid at the augmented rate."

⁸ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ 20 C.F.R. § 10.607(b); *Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ See *Leona N. Travis*, *supra* note 9.

¹² See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹³ See *Velvetta C. Coleman*, 48 ECAB 367, 370 (1997).

¹⁴ See *Pete F. Dorso*, 52 ECAB 424 (2001); *Thankamma Matthews*, 44 ECAB 765, 770 (1993).

ANALYSIS

In its March 11, 2013 decision, OWCP determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was recorded as received on September 4, 2012, more than one year after OWCP's September 2, 2011 merit reconsideration decision. On appeal, counsel argued that her request for reconsideration was timely and submitted new evidence regarding the date on which her request was received by OWCP. However, the Board lacks jurisdiction to review evidence for the first time on appeal.¹⁵ Appellant may submit new evidence regarding the date on which her request for reconsideration was received with a written request for reconsideration to OWCP.

As the evidence before the Board indicates that appellant's request for reconsideration was recorded as received on September 4, 2012, more than one year after OWCP's September 2, 2011 decision, she must demonstrate clear evidence of error in that decision.¹⁶ Appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its September 2, 2011 decision. She did not submit the type of positive, precise and explicit evidence which manifests on its face that OWCP committed an error.

Appellant submitted a report from Dr. Ackerman in support of her request for reconsideration. Dr. Ackerman stated that on February 2, 2010 appellant slipped and fell, landing on her right side. He compared x-rays taken in 2006 with x-rays taken in 2010 and found no significant increase in degenerative changes. Dr. Ackerman stated that it was his opinion to a reasonable degree of medical certainty that the injury of February 2, 2010 aggravated appellant's preexisting osteoarthritis of the hip and that this led to the need for a total hip replacement.

The Board finds that this report is insufficient to establish clear evidence of error in OWCP's September 2, 2011 decision. Although Dr. Ackerman's report was supportive of appellant's claim, it is not sufficient to establish error in the previous decision. The term clear evidence of error is intended to represent a difficult standard. Appellant must submit evidence which on its face shows that OWCP made an error (for example, proof that a schedule award was miscalculated or that the medical report was for another patient). Even evidence such as a detailed, well-rationalized medical report which, if submitted with a timely request for reconsideration would have created a conflict of interest requiring further development, is not enough to establish clear evidence of error.¹⁷ Dr. Ackerman's report does not suggest error with OWCP's decision but simply discusses the current medical condition of appellant. Therefore, OWCP properly denied appellant's claim.

¹⁵ 20 C.F.R. § 501.2(c).

¹⁶ *Id.*

¹⁷ *Supra* note 5 at Chapter 2.1602.3(c); *see T.B.*, Docket No. 13-1827 (issued December 2, 2013).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim on the grounds that her request was recorded as untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the March 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board